Yellow Cab of Quincy, Inc., South Shore Taxi, Inc., and Quincy Taxi, Inc., d/b/a Yellow Cab Co. *and* General Warehousemen, Shippers, Packers, Receivers, Stockmen, Chauffeurs and Helpers Union Local No. 504, a/w International Brotherhood of Teamsters, AFL–CIO, Petitioner. Case 1–RC–19875

September 16, 1993

DECISION ON REVIEW AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On December 29, 1992, the Regional Director for Region 1 issued a Decision and Direction of Election in which she found that the Employer's taxicab drivers are not independent contractors but are employees within the meaning of Section 2(3) of the Act. The Board, by Order dated January 28, 1993 (not included in bound volumes), granted the Employer's request for review of the Regional Director's determination. Pursuant to the Board's procedures, the election was conducted as scheduled on January 28, 1993, in the unit found appropriate by the Regional Director, and the ballots were impounded.

Having carefully considered the entire record, including the request for review and the Petitioner's opposition brief, we have decided to affirm the Regional Director's decision. We find that due to the extent of the Employer's control over the drivers' means and manner of operation of the cabs after they leave the garage, and the degree of correlation between the Employer's income and the amount of fares collected by the drivers, the drivers are employees within the meaning of Section 2(3) of the Act.

The Employer's Operations

A. *Overview*

The Employer owns and operates 27 cabs. The cabs are licensed by the city of Quincy and are painted with the Employer's logo. The Employer sells advertising space on the cabs and maintains and pays for insurance. The city of Quincy sets the maximum meter rate that can be charged.

The Employer maintains seven cabstands located throughout Quincy. When a customer calls the Employer for a cab, the dispatcher offers the fare to the first cab in line at the stand nearest to the call.

Drivers are required to call in to the dispatcher immediately in the event of an accident, and either to call in or bring the cab into the garage in the event of a breakdown. The Employer owns a tow truck and employs its own mechanics; if a driver has to call for a commercial tow truck, the Employer pays for it.

B. *Prior to April 1992*[1]

Prior to April, the Employer paid the drivers on a commission basis (drivers retained 40 percent of their fares, plus tips), withheld taxes, maintained worker's compensation and unemployment insurance, offered health insurance, and paid for fuel. The drivers recorded their fares on a waybill that was given to the Employer at the end of each shift. New drivers were required to fill out an application for employment that asked for basic identifying information as well as references; marital status; whether the applicant owned or rented his residence; past accidents, license suspensions or revocations; and whether the applicant or any relative had ever worked for the Employer in the past.

New drivers were given a driver's manual which required drivers to be clean shaven; prohibited the wearing of certain hats; required drivers to report on time; required drivers to call the dispatcher every 2 hours; required drivers to record specific information on the waybills, including the fare collected, the number of passengers, the origination and termination points of each trip, and the times of each trip; and required drivers to answer the dispatchers' radio calls. Drivers testified that they handed out ''Yellow Cab'' business cards to customers who requested the Employer's phone number or a receipt. The commission drivers were not allowed to be requested personally by customers, and were required to accept dispatches; if they turned a dispatch down, they were ordered back to the garage.

C. *April 1992 Changes*

Beginning on April 28, the Employer offered current drivers the option of signing a lease; all new drivers thereafter were required to sign a lease. The Employer unilaterally set the terms of the lease and refused to let the lease drivers retain a copy of the signed leases. Initially, only 10 of approximately 40 drivers elected to sign leases. The remainder of the drivers continued to drive on a commission basis.

Under the terms of the lease, the Employer no longer offers health benefits, withholds taxes, maintains worker's compensation or unemployment insurance coverage, or pays for fuel. The lease contains an acknowledgement that the relationship between the parties is lessor-lessee, and *not* employer-employee. The lease also provides that the lessee is not required to account for fares collected; that the lessee may use the Employer's telephone and dispatching service, but is not required to accept any dispatch; and that the lessee is not restricted to any particular area. Further, the lease bans subleasing, requires the lessee to furnish a $250 collision damage waiver and a $250 security de-

[1] All dates, unless noted, refer to 1992.

posit, and requires that the cabs be returned neat and clean with a full tank of gas.

The lessees pay the Employer a rental fee of 50 cents per mile.[2] The lease nominally is for a period of not more than 24 hours, but the lease is automatically renewed every day by delivery and acceptance of a cab. In practice, the drivers sign up for one of five daily shifts, for 1 to 7 days per week, when they begin leasing from the Employer.[3] Drivers select their shifts, and their hours and days, but their selections are based on the vacancies that the Employer considers to be available. The Employer limits the number of cabs that can be leased during any one shift, and unilaterally assigns a cab to a driver. Drivers are expected to return their cab promptly at the end of their shift, since there is another driver waiting for it, and the dispatcher calls over the radio for the return of the cabs 10 minutes before the end of each shift. The Employer limits the number of drivers on its roster to 44.

At the end of a driver's shift, the dispatcher collects the driver's waybill (with the cab's odometer readings) and determines the driver's fee, which the driver then pays. The next day, the general manager records the figures from the waybill onto schedule A of the lease. The waybills are stored for 90 days in case of police inquiry or tickets. As when they were driving on commission, the drivers are responsible for their own traffic and parking tickets. Schedule A of the lease lists start and finish odometer readings, miles driven, the rental fee (50 cents per mile), a 5-percent Massachusetts sales tax, the security deposit and collision damage waiver fee, time in and out, hours leased, and the amount of charge accounts. The driver deducts any charge accounts from the amount he pays to the Employer and, once per month, the Employer bills and collects those fares directly from the charge account customers.

The Employer's general manager testified that drivers are free to: charge less than the meter rate; pass out personal business cards; have customers request a driver by name; turn down any dispatch; and hire assistants. In addition, the Employer contends that drivers may use the cabs for personal business and, in their free time, may drive for another cab company. Despite the Employer's assertions, the Regional Director found that the Employer could not identify any driver who charged less than the meter rate; that the Employer admitted it would probably not be profitable for drivers to charge less than the maximum meter rate allowed; that the dispatchers do not tell the drivers the destination of fares before the driver has to decide whether or not to accept the fare; that only one driver has his own business cards and an assistant (a girlfriend who answers his phone and who may not be paid); that the Employer's dispatchers ignored requests for specific drivers; that the drivers are prohibited from subleasing; that the drivers are prohibited from allowing an ''assistant'' to drive the cab; that the Employer could not name any driver who also drives for another cab company; and that the Employer would terminate the lease of any driver who leased a cab, but let it sit idle.

Of the 10 drivers who signed leases in April, only 4 paid a rental fee based on mileage as provided for on schedule A of the lease. The other six drivers were referred to as ''Lease Two'' drivers (even though there is only one lease); they split their fares 50-50 with the Employer and kept their tips. Lease Two drivers were required to accept dispatches.

D. *August and October 1992 Changes*

On August 31, all remaining commission drivers, with one exception, were told that they must sign leases.[4] On October 2,[5] the Employer eliminated the ''Lease Two'' category of driver and all drivers became subject to the mileage fee. On October 12,[6] the Employer discontinued use of its application for employment and began using an application for lease, which requested the same information as the prior form, but substituted the word ''lease'' wherever the word ''work'' appeared. On October 12, the Employer also issued a ''Lessee's Manual'' to replace the ''Driver's Manual''; the new manual was distributed to 2 drivers by October 13, and to 35 drivers by October 20. The lessee's manual contains a ''suggestion'' that drivers be dressed neatly and cleanly and an ''expectation'' that drivers will fill in the mileage, times, and location portions of their waybills. On October 14, the Employer issued a memo stating that drivers were only expected to fill out mileage columns and times and locations of trips on the waybills.

Analysis

Independent contractors are excluded from the definition of ''employees'' in Section 2(3) of the National Labor Relations Act. The Board applies a common law right-of-control test to determine whether individuals are employees or independent contractors. As the Board stated in *Air Transit*, 271 NLRB 1108, 1110 (1984), quoting *News Syndicate Co.*, 164 NLRB 422, 423–424 (1967):

> Where the one for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment; while, on

[2] New drivers pay 45 cents per mile the first seven times that they lease a cab.

[3] After converting to lease drivers, many former commission drivers simply kept their previous schedules.

[4] The last commission driver was told that he must sign a lease on his return from vacation in October.

[5] The instant petition was filed on September 18.

[6] The hearing in this matter was held on October 13, 14, and 20.

> the other hand, where control is reserved only as to the result sought, the relationship is that of an independent contractor. The resolution of this question depends on the facts of each case, and no one factor is determinative.

More specifically, when examining whether taxicab drivers are independent contractors or employees, the Board considers: (1) whether the employer controls the drivers' means and manner of operation after leaving the garage; and (2) whether there is any correlation between the employer's income and the amount of fares collected by its drivers. *Checker Cab Co.*, 273 NLRB 1492 (1985); *Air Transit*, supra. In the instant case, the Regional Director found that the Employer exercises control over the drivers' means and manner of operation, and that there is a sufficient correlation between the Employer's income and the fares collected by the drivers to warrant a finding that the drivers are employees and not independent contractors.

We agree with the Regional Director's findings for the following reasons. First, we find it significant, for the reasons stated below, that the rental fee paid by the drivers to the Employer is based solely on the number of miles driven by the drivers. Second, we also find it significant that the Employer controls the shifts and the number of hours driven by each driver. We further find that these facts make this case materially distinguishable from *Yellow Taxi of Minneapolis v. NLRB*, 721 F.2d 366 (D.C. Cir. 1983) (*Yellow Taxi*), denying enf. 249 NLRB 265 (1980); *NLRB v. Associated Diamond Cabs*, 702 F.2d 912 (11th Cir. 1983) (*Associated Diamond*), denying enf. 254 NLRB 1052 (1981); and *Seafarers Local 777 (Yellow Cab) v. NLRB*, 603 F.2d 862 (D.C. Cir. 1978), rehearing denied 603 F.2d 891 (1978) (*Seafarers*), denying enf. in relevant part 237 NLRB 1132 (1978), in which the courts, in disagreement with the Board, found that certain cab drivers were independent contractors rather than employees.[7]

The mileage-based rental structure links the Employer's income directly to the drivers' fares because the fares paid by the customers to the drivers are based on mileage,[8] and the rental fee paid by the drivers to the Employer is also based on mileage. In effect, the Employer is receiving a percentage of the drivers' fares, just as it did when the drivers worked on a commission basis. The mileage-based rental fee is similar to the employer's practice in *City Cab of Orlando v. NLRB*, 628 F.2d 261 (D.C. Cir. 1980), enfg. 242 NLRB 94 (1979), of varying the rental rates based on the drivers' amount of business. As the D.C. Circuit noted in *Yellow Taxi*, ''such a practice might suggest that the leasing fees charged are actually commissions disguised as 'rents.''' 721 F.2d at 378.

Yellow Taxi, *Seafarers*, and *Associated Diamond* are thus distinguishable from the present case because none involved pure mileage-based lease fees. In *Yellow Taxi*, the cab company offered a wide range of leasing arrangements—all based on flat, fixed rental fees. In both *Seafarers* and *Associated Diamond*, the cab companies charged a flat fee plus mileage charges for leased cabs. The mileage fee in both cases was, however, a small percentage of the fee paid by the drivers. A flat fee is evidence of an independent contractor relationship because it places on the drivers a strong incentive to maximize their trips since, once the flat fee is recouped, income is largely profit; in addition, a flat fee insulates a cab company from variations in income because regardless of the drivers' earnings, the company receives the same amount from the drivers. The pure mileage-based rental fee imposed by the Employer in this case, on the other hand, results in a direct correlation between the Employer's income and the amount of fares collected by the drivers, thus substantially limiting the drivers' entrepreneurial opportunities and strongly indicating that the drivers are statutory employees. *NLRB v. O'Hare-Midway Limousine Service*, 924 F.2d 692 (7th Cir. 1991), enfg. 295 NLRB 463 (1989); *Air Transit*, 271 NLRB 1108, 1110 (1984).[9]

Further, the rental fee structure in this case limits drivers' entrepreneurial opportunity in other ways. The Employer's 50-cent-per-mile rental fee discourages drivers from ''cruising'' for fares because the driver must pay the Employer 50 cents per mile driven, regardless of whether the cab has a passenger.[10] The rental fee structure, therefore, encourages the drivers to rely on the Employer's dispatching service. In fact, the Regional Director found that approximately 90 percent

[7] We note that in addition to the primary factors discussed in the body of our decision, a number of other factors also support a finding that the drivers at issue are statutory employees, including: drivers are subject to a dress code; are prohibited from subleasing the cabs; receive a majority of their fares from the Employer's radio dispatch system; are required to complete waybills at the conclusion of each shift; are subject to lease terms set unilaterally by the Employer; and have no equity investment in the cabs.

[8] The city of Quincy sets the maximum meter rate, which at the time of the hearing was $2.75 for the first mile and $1.75 for each additional mile.

[9] As the Court of Appeals for the D.C. Circuit stated in *Seafarers*:

> When a driver pays a fixed rental, regardless of his earnings on a particular day, and when he retains all the fares he collects without having to account to the company in any way, there is a strong inference that the cab company involved does not exert control over ''the means and manner'' of his performance. This conclusion is justified because under such circumstances, the company simply would have no financial incentive to exert control over its drivers, other than such as is necessary to immunize the proprietor of a cab from liability which arises from its operation by virtue of the lessor's ownership. [*Seafarers*, 603 F.2d at 879.]

[10] The mileage fee also discourages drivers from using the cabs for personal business. The Employer further indicated that it would terminate a lease if the driver let the cab sit idle or used it to take his family to a movie.

of the drivers' fares are acquired through the Employer's dispatching service.

Because the mileage-based rental fee encourages the drivers to rely on the Employer's dispatching service, the Employer is able to exert control over the means and manner of the drivers' operation of the cabs. The Employer, through its dispatchers, selects which cab to dispatch to pick up a particular fare. Although the drivers are theoretically free to refuse a dispatch, drivers cannot ask the dispatcher where fares are going before making that decision. It is difficult to imagine what other information would be more crucial to the driver when he decides whether or not to accept a fare from the dispatcher. Thus, the Employer can effectively regulate how much and what type of business each driver receives.

In addition, because the Employer's income is based on the rental fees paid by the drivers, and the rental fees are, in turn, based entirely on the number of miles driven, the Employer has an incentive to have the cabs driven as many miles as possible. For example, the Regional Director found that it is the Employer's practice not to dispatch a single cab to handle both a package pickup and a passenger fare in the same area because the Employer realizes more revenue if separate cabs are sent to respond to each call. The incentive to maximize the number of miles driven by each cab, combined with the drivers' substantial reliance on the Employer's dispatching service, gives the Employer both a motive for, and a method of, controlling the drivers' means and manner of operating the cabs.

Finally, the Employer regulates the number of cabs on the road at any one time, the number of drivers on its roster, and the number of hours that each driver operates. As the Regional Director found, drivers are expected to work set shifts and hours per week. Each driver is assigned a schedule when he begins driving for the Employer, based on the Employer's needs. A driver cannot, on his own, decide what hours and days he will work, and cannot extend or curtail his shift without notifying the Employer. Drivers are required to notify the Employer if they are going to be late for or miss a shift. Moreover, because another driver generally is waiting for each cab in service, it is difficult for a driver to extend a shift. The Employer's control over drivers' hours and shifts is another indication that its drivers are employees, rather than independent contractors. See *NLRB v. O'Hare-Midway Limousine Service*, supra; *Metro Cars*, 309 NLRB 513, 514 (1992).

The Employer's general manager testified that if he feels business is good on a particular day, he may ask a driver to work longer or may call a driver and ask him to come in to work. Although the drivers retain the right to say no to the general manager, this is another manifestation of the direct interest that the Employer has in the fares collected by drivers. The Employer's general manager also testified that he determines the number of cabs he wants out on the road at any particular time, and that he has turned down drivers' requests to lease a cab during shifts that they are not regularly scheduled to work. The limitations imposed by the Employer on the drivers' ability to lease cabs reduces the drivers' opportunity to increase their income and business through their own efforts.

Yellow Taxi and *Associated Diamond* are further distinguishable from this case because in each of those cases, the court found that the cab companies did not control the drivers' hours. See *Yellow Taxi*, 721 F.2d at 376; *Associated Diamond*, 702 F.2d at 921. In *Yellow Taxi*, as indicated, the court noted that the company offered a wide variety of leases, set no minimum or maximum on the number of hours that the lessees could drive, and allowed lessees to add extra hours to any lease period by paying an extra $3 per hour. Entrepreneurial opportunities were thus readily available to the drivers. In *Associated Diamond*, the court found that ''the company exercises absolutely no restraint over the hours a lessee drives.'' 702 F.2d at 921. The drivers in *Associated Diamond* could not drive more than two consecutive shifts, but during a shift could drive anywhere from 1 to 12 hours, at their discretion. In contrast, the Employer in this case exercises significant control over the drivers' hours and shifts.[11]

In sum, despite the few circumstances facially indicative of independent contractor status, we find that the evidence weighs heavily in favor of a determination that the drivers are employees. Accordingly, for the reasons discussed above, we find that the Employer's drivers are employees as defined in Section 2(3) of the Act.

ORDER

The Regional Director's Decision and Direction of Election is affirmed. The Regional Director is directed to open and count the ballots cast in the January 28, 1993 election and issue the appropriate certification.

MEMBER RAUDABAUGH, dissenting.

I do not agree that the drivers in this case are statutory employees. Instead, I would find them to be independent contractors.

The Employer made a series of changes affecting the drivers. The changes began in April 1992, and there were subsequent changes in August and October 1992. My colleagues believe that, even after all the changes, the drivers remained employees. I believe

[11] See, e.g., *City Cab of Orlando v. NLRB*, supra, in which the court, in holding the employer's cabdrivers to be employees rather than independent contractors, found that the employer ''significantly regulates'' the hours its drivers could work, because the drivers were unable to return or pick up their cabs between 11:30 a.m. and 2:30 p.m. daily. Id. at 264. As shown above, here the Employer exercises even greater control over its drivers' hours and shifts.

that, after all the changes were completed, the drivers were independent contractors. Thus, it is appropriate to focus on the driver conditions that existed after the last changes in October.[1]

The Employer gives the drivers a substantial degree of independence. They were free to use or not use the Employer's dispatch system. They are also free to reject a dispatch and are not required to account for fares. They are permitted to hire assistants, to hand out business cards, to encourage clients to specifically request them in the future, and to engage in other employment, including driving for another cab company. Further, under the lease arrangement, the rules governing the dress code and fare reporting have been relaxed. More particularly, the employer no longer requires that drivers be clean shaven and no longer prohibits certain attire. The lessee's manual merely *suggests* that drivers be dressed neatly and cleanly. Drivers are no longer required to record specific information on their waybills.

My colleagues seek to counterbalance these indicia of independence by pointing to the fact that the drivers pay for their vehicles on a mileage basis. The argument is that the employees are economically tied to the dispatch system because ''cruising'' for fares would add mileage and thus costs for the drivers. This argument overlooks the fact that drivers are free to station their cabs wherever they think the customers will be plentiful, and drivers are free to change stations depending on where they think the customers will be. In addition, they are free to work from 1 to 7 days per week (assuming that there are available shifts). In sum, the drivers are free to earn more by using business acumen and hard work. In view of this entrepreneurial freedom and the indicia of independence set forth supra, I would find these drivers to be independent contractors.

[1] There is an unfair labor practice complaint attacking the October changes. The complaint is against the Employer in Case 1–CA–29859(2). My colleagues have concluded that, even if the Employer prevails in its contention that the changes were lawful, the drivers remain statutory employees. As noted, I disagree. Accordingly, I would reconsider the question of status if the changes were found to be unlawful.